No. 75-1110

In The

# Supreme Court of the United States

October Term, 1975

ANTHONY J. BUFFA, *Petitioner*

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## REPLY BRIEF OF PETITIONER

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Respondent raises three points in its Memorandum as follows:

FIRST: Respondent argues that Petitioner was not prejudiced by the Court's charging both subsections of 18 U.S.C. 2 because he was found guilty of directly violating 18 U.S.C. 472 and 473.

An error in part of a charge is not cured by a correct charge in another part as it is impossible to determine upon which part the jury relied. *Mills* vs. *United States* (1897) 164 U.S. 644. An erroneous charge on one count which necessarily had a prejudicial effect upon the Defendant with regard to the other counts held ground for reversal. *Graves* vs. *United States* (1897) 165 U.S. 323.

A general verdict of guilty must be set aside where it is supportable on one ground but not on another and it is impossible to tell which ground the jury selected. *Stromberg* vs. *California* (1931) 283 U.S. 359. *Yates* vs. *United States* (1957) 354 U.S. 298.

SECOND: Respondent argues that the trial court did not commit error by charging both subsections of 18 U.S.C. 2. To reach this result, Respondent had to ignore the statute that subsection (b) applies to a situation where a person causes an innocent agent to perform an act which, if performed by such person, would have been an offense.

To the contrary, subsection (a) applies where a person aids and abets another in the commission of an offense. Respondent reaches its conclusion that both subsections may be charged without incurring error by overlooking the fact that subsection (b) applies when a person acts through an *innocent* agent.

In the case at bar, Tedesso was not "innocent". Subsection (a) could apply, but certainly not subsection (b). A conviction ought not to rest on an equivocal direction to a jury on a basic issue. *M. Kraus & Bros. Inc.*, v. *United States* (1946) 327 U.S. 614. *Bollenbach vs. United States* (1946) 326 U.S. 607.

THIRD: Respondent argues that Petitioner has cited no authority for the proposition that the two subsections are mutually exclusive. An examination of the two subsections clearly shows that only one or the other can apply to a given set of facts. It seems, however, that this is a new question which has not been raised, although district judges have been consistently and regularly charging both subsections in practically all criminal cases.

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The fact that such a charge is misleading and confusing to the jury appears in the record; the jury twice asked the Court for further instructions in regard to aiding and abetting.[1] A charge to the jury in a criminal case should not be misleading. *Agnew* vs. *United States* (1897) 165 U.S. 36.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be granted.[2]

JAMES EASLY
*Attorney for Petitioner*

[1]Respondent (top of page 3 of its Memorandum) states: "Thus, petitioner was shown to have directly violated 18 U.S.C. 472 and 473." There is no basis for this statement. Respondent feels enabled to make such a statement by ignoring the record where it appears that the jury twice asked instructions about Section 2, 18 U.S.C.

[2]Respondent relies on the Opinion of the Court of Appeals (Footnote 3 of its Memorandum). The Court of Appeals found that an instruction that "subsidiary facts" do not have to be proved beyond a reasonable doubt was not plain error because Appellant's guilt was overwhelming. To reach this result, the Court of Appeals had to ignore Appellant's conviction on 18 U.S.C. 2; thereby evading the facts that the jury had twice asked for additional instructions as to aiding and abetting which facts simply refute any claim of "overwhelming guilt". Respondent now admits the conviction of Petitioner on Section 2 but ignores the two requests of the jury for additional instructions on Section 2.

## CERTIFICATE OF SERVICE

James Easly, a member of the Bar of the Supreme Court of the United States and counsel of record for Anthony J. Buffa, petitioner herein, hereby certifies that on April , 1976, pursuant to Rule 33, Rules of the Supreme Court, he served three copies of the foregoing Reply Brief of Petitioner on the Solicitor General of the United States, Respondent herein, by depositing such copies in the United States Post Office, Cleveland, Ohio, with air mail postage prepaid, properly addressed to the post office address of the Solicitor General at Department of Justice, Washington, D.C., 20503.

JAMES EASLY
*Attorney for Petitioner*

April, 1976

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